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No. 10-

IN THE

Supreme Court of the United States

ALFONSO MORRIS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Court held that the Eighth Amendment prohibited states from executing individuals who are mentally retarded. The Court left it to the states to determine how mental retardation should be defined and how *Atkins* should be applied. Since then, approaches to *Atkins* have diverged, and in some cases courts have chosen approaches inconsistent with *Atkins* itself.

This petition—in which the Alabama Court of Criminal Appeals held that Petitioner was not mentally retarded, even though his IQ scores were 50 and 53—presents two questions that have divided federal appellate courts and state high courts, and that are central to the *Atkins* inquiry:

1. Whether an expert's determination that a defendant malingered on one of his IQ tests can automatically compel the conclusion that the defendant is not mentally retarded—even in the face of expert testimony that, notwithstanding any malingering, the defendant still has an IQ low enough to establish mental retardation.

2. Whether evidence of deficits in adaptive behavior from the defendant's childhood can be overcome by testimony about his functioning in prison—given the near scientific consensus that adaptive assessments based on incarcerated behavior are unreliable and overstate the defendant's capabilities.

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Petition For A Writ Of Certiorari

Petitioner Alfonso Morris respectfully petitions for a writ of certiorari to the Alabama Court of Criminal Appeals in *Morris* v. *State*, No. CR-07-1997.[1]

Opinions Below

The judgment of the Alabama Court of Criminal Appeals is reported at __ So. 3d __, 2010 WL 415245 (Ala. Crim. App. Feb. 5, 2010) and reprinted at Pet. App. 1a. The court's order denying rehearing is unpublished and reprinted at Pet. App. 121a. The Alabama Supreme Court's order denying discretionary review is unpublished and reprinted at Pet. App. 122a. The trial court's oral decision finding Mr. Morris eligible for the death penalty is reprinted at Pet. App. 143a, and the trial court's written order sentencing Mr. Morris to death is reprinted at Pet. App. 124a.

An earlier decision of the Alabama Court of Criminal Appeals in this case is reported at 956 So. 2d 431 (Ala. Crim. App. 2005) and reprinted at Pet. App. 160a.

Jurisdictional Statement

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

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[1] Although Mr. Morris's first name has been spelled both "Alfonso" and "Alfonzo" in proceedings below, the proper spelling is "Alfonso."

Petitioner's claim has been properly presented and preserved at all stages below. At an evidentiary hearing held on November 26, 2007, Petitioner argued that under *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Eighth Amendment prohibited his execution because he is mentally retarded; the trial court rejected this argument on the merits in an oral ruling on the same day. Pet. App. 143a–146a. In a written ruling issued on June 20, 2008, the trial court sentenced Petitioner to death. Pet. App. 141a.

On direct appeal to the Alabama Court of Criminal Appeals, Petitioner again argued that under *Atkins*, the Eighth Amendment prohibits his execution because he is mentally retarded. Pet. App. 8a–9a. In a written opinion dated February 5, 2010, the Alabama Court of Criminal Appeals rejected this argument on the merits. Pet. App. 8a–29a. Petitioner filed a timely application for rehearing to the Alabama Court of Criminal Appeals, which denied the application on April 16, 2010. Pet. App. 121a. Petitioner then filed, with the Alabama Supreme Court, a timely petition for certiorari, which was denied on September 17, 2010. Pet. App. 122a.

Constitutional And Statutory Provisions Involved

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall

any State deprive any person of life, liberty, or property, without due process of law."

Statement of the Case

This is a death penalty case. After three trials, which included one hung jury, Petitioner Alfonso Morris was sentenced to death for murder. Although Mr. Morris's IQ scores were 50 and 53, the latter from a test by a court-appointed expert, the Alabama Court of Criminal Appeals rejected his argument that he was ineligible for the death penalty because he is mentally retarded.

A. Mr. Morris's Competency Hearing and First Trial.

On February 24, 1997, 85-year old Miriam Rochester was found dead in her home, after an apparent burglary. Pet. App. 2a, 4a. Mr. Morris was arrested the next morning for public intoxication, and he was later charged with the murder. Pet. App. 5a.

In February 1999, Mr. Morris filed a plea of not guilty by reason of mental disease or defect. *Id.* at 167a. The trial court appointed Dr. Kimberly Ackerson, a certified forensic examiner, to evaluate Mr. Morris. *Id.* at 168a. She concluded that Mr. Morris was incompetent to stand trial, *id.*, and diagnosed him as mentally retarded, *id.* at 172a–74a. Dr. Ackerson's testing revealed that Mr. Morris had an "IQ score of 53"—"in the moderate range of mental retardation and is well below the first percentile." *Id.* at 170a–71a.

Dr. Ackerson stated that Mr. Morris "appeared to put forth his best effort during testing, and he was generally cooperative during the interview sessions." *Id.* at 170a. She also noted that IQ testing from Mr. Morris's childhood, as documented in school records, "revealed that his intellectual functioning was 'well below average.'" Pet. App. 169a–70a.

In December 2001, the court ordered that Mr. Morris be committed to Taylor Hardin Secure Medical Facility, where he stayed until February 2002. *Id.* at 176a. After several delays, the court held a competency hearing in December 2002. *Id.* at 177a. At the hearing, Dr. Kamal Nagi, who evaluated Mr. Morris during his stay at Taylor Hardin, testified that Mr. Morris "was malingering his lack of knowledge of the legal process and the charges against him." *Id.*

Defense counsel repeatedly asked the trial court for funds to hire an independent mental-health expert to evaluate Mr. Morris, noting that "an expert was necessary to support the plea of not guilty by reason of mental disease or defect." *Id.* at 180a. The trial court denied the motion on February 26, 2003. *Id.* at 180a–81a.

Without funds to hire an expert, Mr. Morris withdrew his plea of not guilty by reason of mental disease or defect. *Id.* at 183a. Mr. Morris presented no defense during the guilt phase, and he was convicted of capital murder. *Id.* By a vote of 10–2, the jury recommended that Mr. Morris be sentenced to death, *id.* at 160a–61a; the trial court accepted the jury's recommendation and sentenced Mr. Morris to death, *id.* at 161a.

On appeal, the Alabama Court of Criminal Appeals reversed both the conviction and sentence, holding that "the trial court erred to reversal when it denied Morris's request for funds to hire an independent mental-health expert." *Id.* at 185a. Noting that a mental-health expert was critical to Mr. Morris's defense at the sentencing phase, *id.* at 202a, the court observed, among other things, Dr. Ackerson's finding that "Morris was functioning in the moderate range of mental retardation." *Id.* at 191a.[2]

B. The *Atkins* Hearing.

On remand, and after Mr. Morris received the funds necessary to secure his own expert, the trial court held a hearing to determine whether Mr. Morris was mentally retarded under *Atkins*.

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[2] The Court of Criminal Appeals also rejected the state's argument that certain letters and pleadings, purportedly written by Mr. Morris, foreclosed a finding of mental retardation. Prior to trial, the prosecutor had presented these documents to Dr. Ackerson and informed her that Mr. Morris had written them, leading her eventually to opine that "Morris had exaggerated his intellectual deficits during her evaluation of him, because someone in the moderate range of mental retardation could not have written the types of letters she was provided to review." Pet. App. 204–05a.

As the Court of Criminal Appeals recognized, however, "it was this *unsubstantiated assertion* that led Dr. Ackerson to change her opinion about Morris's cognitive functioning." *Id.* at 205a (emphasis added). The court held that "[t]he record does not support the State's assertion, which it made before trial to Dr. Ackerson and during trial to the court and which it continues to make on appeal, that Morris *wrote* the documents." *Id.* (emphasis in original).

1. Mr. Morris presented the expert testimony of Dr. Allen Shealy, who at the time was one of only three board-certified forensic psychologists in Alabama. *Id.* at 147a–48a. Dr. Shealy interviewed Mr. Morris and his sisters, and reviewed prior evaluations of Mr. Morris as well as other documentary evidence. *Id.* at 148a–49a.

Based on his own testing, Dr. Shealy concluded that Mr. Morris "was mentally retarded and was in the range of mild mental retardation and had a full-scale IQ of fifty which falls below the first percentile of the general population." *Id.* at 149a. Dr. Shealy also "considered [the] IQ test administered in 1999 by Dr. Kimberly Ackerson, finding that Morris had a full scale IQ of 53." *Id.* at 14a. As for Mr. Morris's adaptive behavior, Dr. Shealy had concluded that Mr. Morris "was significantly impaired in several areas," including communication, daily living, and socialization, and that "his adaptive behavior had been impaired since childhood"—such that Mr. Morris's "mental retardation had manifested before [he] reached age 18." *Id.* at 15a–16a; *see also id.* at 157a–58a.

2. Mr. Morris also took an IQ test administered by Dr. Glenn King, the State's expert psychologist, and received an IQ score of 41. *Id.* at 20a. Dr. King asserted that Mr. Morris was malingering because, among other things, of his scores on the Test of Memory Malingering. *Id.* at 22a. Dr. King did not formally opine on Mr. Morris's IQ, stating only that it was "possibly in the low 80s." *Id.*

In light of Dr. King's opinions, Dr. Shealy also addressed the possibility that Mr. Morris was malingering. Dr. Shealy conceded that Mr. Morris's motivation "might have been less than optimal" during Dr. King's test. *Id.* at 154a. But Dr. Shealy noted that malingering does not necessarily foreclose a diagnosis of mental retardation: "the conclusion that because somebody is malingering on a malinger[er]'s test does not lead one to the automatic conclusion that the person is not mentally retarded." *Id.* Rather, "it would lead to the conclusion by that examiner that he's functioning somewhat higher than the obtained IQ score." *Id.*

Dr. Shealy testified that a mentally retarded individual "is capable of taking a [malingerer's] test and scoring in the range that would indicate that he's malingering, even if he's mentally retarded." *Id.* at 150a. *See also id.* at 156a ("[Y]ou can have an IQ in the range of mild mental retardation and still be bright enough to [malinger], still have enough intellectual ability to do that."); *id.* at 157a ("[J]ust because somebody is mentally retarded doesn't mean they can't also be malingering."). Ultimately, Dr. Shealy concluded that Mr. Morris "may have been malingering, but it's my conclusion that he was still mentally retarded." *Id.* at 159a.

Dr. Shealy elaborated upon his conclusion that Mr. Morris was mentally retarded, even if he had been malingering on Dr. King's test.

First, Dr. Shealy noted that tests designed to detect malingering, including the Test of Memory Malingering administered by the State's expert

psychologist, are often inaccurate and produce false positives. He noted that scientific literature has documented that malingering tests "should be viewed with extreme caution when they're used with mentally retarded subjects." *Id.* at 151a.

Second, Dr. Shealy testified that during his evaluation, Mr. Morris was in fact attempting to demonstrate his ability to function, not trying to downplay his ability to do so. According to Dr. Shealy, "if he had been malingering that he is mentally retarded, I don't know why he would have offered to [show] me what he could do." *Id.* at 158a.

Third, Dr. Shealy noted that when Mr. Morris was six years old, his school administered the Primary Mental Abilities Test and concluded that Mr. Morris "had an IQ of seventy-three." *Id.* at 152a. According to Dr. Shealy, "the American Association of Mental Retardation specifies that in terms of IQ, that the person has to . . . have an IQ score of seventy to seventy-five or [below] on a standardized individual intelligence test." Nov. 26, 2007 Hearing Tr. (Supp. Record Vol. 2) at 18. According to Dr. Shealy, "if we know from the history that he's been mentally retarded since six years old, it makes the issue of whether he's malingering in adulthood moot." Pet. App. at 151a.

Indeed, testimony from Mr. Morris's siblings revealed that Mr. Morris developed more slowly than other children, that he did not learn to talk until age three, and that he "had difficulty playing games with the other children in the community." Nov. 26, 2007 Hearing Tr. (Supp. Record Vol. 2) at 71–72. Mr. Mor-

ris was classified by his school as "Slow." Clerk's Record (Second Supp. Record) at 383. Mr. Morris's school records detailed that he failed most of his classes, that he was forced to repeat eighth grade, and that he dropped out of school in ninth grade. *Id.* at 382, 386.[3] And his sisters testified that he has never held any type of long-term employment, could not fill a prescription or take medicine as directed, could not take his temperature if he was sick, and could not wash clothes or vacuum properly. Nov. 26, 2007 Hearing Tr. (Supp. Record Vol. 2) at 39, 73–75, 79.

3. The State introduced evidence about Mr. Morris's activities during his incarceration, including testimony from a nurse, Vicki Webster, that "she had met with Morris at least six times concerning his medical conditions and treatments while he was incarcerated at the jail." Pet. App. 17a. According to

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[3] From grades one through five, Mr. Morris received a rating of Unsatisfactory—for each year—in the subjects of Arithmetic, Language, Reading, and Spelling. Clerk's Record (Second Supp. Record) at C-2 383. He received a rating of Unsatisfactory for all years but one in Science and Social Studies. *Id.* In sixth grade, Mr. Morris received grades of D in Arithmetic, Language, Reading, Science, Social Studies, and Spelling. *Id.* In seventh grade, Mr. Morris received grades of D and F in English, F and F in Social Studies, B and B in Math, F and F in Science, and D and D in Physical Education. *Id.* In 8th grade, which he was forced to repeat, Mr. Morris received grades of D+ and D in Arithmetic, F and F in Language, F and C in Science, F and B in Social Studies, and F and F in Spelling. *Id.* at 386. In 9th grade, at the time that Mr. Morris withdrew from school, he was receiving failing grades in English, Math, Science, and Social Studies. *Id.* at 382.

Ms. Webster, Mr. Morris was "able to take advantage of the medical services provided in the jail, as well as fill out the written medical forms." *Id.* In addition, the state introduced evidence that Mr. Morris at one point was self-employed as a provider of lawn services and also made a living "hustling, gambling, stealing [and selling] marijuana," and that he was able to provide jail officials with information about his family. *Id.* at 18a.

As it had done during Mr. Morris's first appeal, the state again attempted to demonstrate that Mr. Morris had written certain court pleadings that had been filed on his behalf in other cases. Although the state's handwriting analyst concluded that Mr. Morris signed his name on each of the documents, "the handwriting in the text of the documents was inconclusive as to the author." *Id.*

In an oral decision, the trial court rejected Mr. Morris's *Atkins* claim. Despite Dr. Shealy's that Mr. Morris had an IQ of 50, even accounting for the possibility of malingering, the trial court asserted that "none of these experts can give you a true IQ score because he's malingering." *Id.* at 143a. Moreover, apparently referring to Mr. Morris's conduct in prison, the trial court stated that "it sounds like to me he's fully capable of adapting and surviving and understanding what he's doing." *Id.* at 144a.

C. Mr. Morris's Second and Third Trials and Appeal.

Mr. Morris's first retrial took place in April 2008. The trial resulted in a hung jury, and the trial court

declared a mistrial. *Id.* at 2a. Mr. Morris was tried for the third time in May 2008, and this time he was convicted. *Id.* By a vote of 10–2, the jury recommended that Mr. Morris be sentenced to death, and the trial court sentenced Mr. Morris to death in June 2008. *Id.* at 39a.

The Alabama Court of Criminal Appeals affirmed the conviction and sentence. Among other things, the court rejected Mr. Morris's argument that the Eighth Amendment prohibited his execution because he is mentally retarded. In so doing, the court held that Mr. Morris had failed to satisfy the three requirements of *Atkins*, as applied by the Alabama courts: that (1) he suffers from below average intellectual functioning, (2) he suffers from significant deficits in adaptive behavior, and (3) these problems manifested themselves before he reached age 18. *See id.* at 11a.

Intellectual Functioning. On the question of Mr. Morris's intellectual functioning, the court acknowledged Dr. Shealy's conclusion that Mr. Morris "was mildly mentally retarded and had a full-scale IQ of 50" and the conclusion of Dr. Ackerson that he "had a full scale IQ of 53 and that he was moderately mentally retarded." *Id.* at 14a. Nevertheless, in upholding the trial court's determination, the court relied on the conclusion by the state's expert, Dr. King, that Mr. Morris's "malingering indicated that he was not mentally retarded." *Id.* at 24a.

Adaptive Behavior/Manifestation Before Age 18. The court also concluded that Mr. Morris had not demonstrated the necessary deficits in adaptive be-

havior, and that his mental retardation had not manifested itself before age 18. The court noted the testimony from Mr. Morris's sister about adaptive deficits, including the deficits that were apparent during Mr. Morris's childhood, but pointed to, among other things, "evidence indicating that Morris sought medical attention in jail when needed and articulately requested his medication or need for treatment." *Id.* at 28a.

The Court of Criminal Appeals denied Mr. Morris's timely application for rehearing on April 16, 2010. *Id.* at 121a. On September 17, 2010, the Alabama Supreme Court denied Mr. Morris's timely petition for certiorari, over the dissent of Justice Murdock. *See id.* at 122a–23a.

Reasons for Granting the Writ

In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Court held that the Eighth Amendment, as applied to the states by the Fourteenth Amendment, prohibits states from executing individuals who are mentally retarded. Although the Court left implementation of *Atkins* to the states, it stressed that states cannot adopt definitions of mental retardation that cover a smaller group than those considered mentally retarded under the national consensus approach. *See id.* at 317.

In concluding that—notwithstanding his IQ scores of 50 and 53—Mr. Morris was not mentally retarded within the meaning of *Atkins*, the Court of Criminal Appeals rested on two bases that contradict the scientific consensus on mental retardation. Each

of these bases, moreover, are contrary to decisions of other federal appellate courts and state high courts and impact significant numbers of death-penalty cases.

I. The Lower Courts Are Divided As To Whether A Defendant's Malingering Necessarily Forecloses a Finding of Mental Retardation.

Under *Atkins*, an IQ "between 70 and 75 or lower" is "considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id.* at 309 n.5. Mr. Morris's documented IQ scores were 50 and 53. Yet the Alabama Court of Criminal Appeals upheld the trial court's decision that Mr. Morris had not established the necessary subaverage intellectual functioning based on the testimony of the state's expert that Mr. Morris's "malingering indicated that he was not mentally retarded." Pet App. 24a.

The court's reasoning—malingering alone can refute a finding of subaverage intellectual functioning—is contrary to a decision of the Texas Court of Criminal Appeals and to the scientific consensus about the intellectual functioning of individuals who are mentally retarded.

A. Notwithstanding his individual IQ scores of 50 and 53, the Alabama Court of Criminal Appeals upheld the trial court's reliance on testimony that Morris's "malingering indicated that he was not mentally retarded." *Id.* Thus, the Court of Criminal Appeals relied solely on malingering as a basis for overriding

the results of the IQ tests—even though Mr. Morris's own expert accounted for the possibility of malingering and notwithstanding the uncontradicted evidence that a mentally retarded individual "is capable of taking a [malingerer's] test and scoring in the range that would indicate that he's malingering, even if he's mentally retarded." *Id.* at 150a.

The reasoning of the Alabama Court of Criminal Appeals is echoed by the Mississippi Supreme Court, which has taken the Alabama approach a step further. In *Chase* v. *State*, 873 So. 2d 1013 (Miss. 2004) (en banc), the Mississippi Supreme Court held that to sustain an *Atkins* claim, the defendant's expert must express, to a reasonable degree of certainty, that a malingering test was completed, and that "the defendant is not malingering." *Id.* at 1029. *See also, e.g.*, *Wiley* v. *Epps*, 625 F.3d 199, 206 (5th Cir. 2010) (Mississippi courts will not afford relief under *Atkins* unless "the defendant is not malingering"); *King* v. *State*, 23 So. 3d 1067, 1075 (Miss. 2009) (same); *Spicer* v. *State*, 973 So. 2d 184, 209 (Miss. 2007) (same).

The decisions of the Alabama Court of Criminal Appeals and Mississippi Supreme Court conflict with a recent decision of the Texas Court of Criminal Appeals. In *Ex parte van Alstyne*, 239 S.W.3d 815 (Tex. Crim. App. 2007), the defendant had taken two IQ tests and received scores of 69 and 56. *See id.* at 818. The state's expert, who administered the second test, expressed concern "about the possibility of malingering on the [defendant's] part." *Id.* Nevertheless, the court held that these concerns about malingering did

not foreclose a finding of mental retardation: "regardless of whether the applicant may have been malingering in an attempt to obtain a lower score ten days later with [the State's expert], the test results obtained by [the defendant's expert], placing the [defendant] within the range of the mildly mentally retarded, remain valid." *Id.* at 818 n.8.[4]

In the context of the death penalty, a division of authority between Alabama and Mississippi, on the one hand, and Texas, on the other, is significant. In 2010, those three states accounted for the majority of American executions. *See* The Death Penalty Information Center, Number of Executions by State and Region Since 1976, *available at* http://www.deathpenaltyinfo.org/article.php?scid=8&did=186 (last updated November 5, 2010). And the question presented is especially important, given the frequency with which states argue that low IQ scores result from malingering rather than mental retardation. *See, e.g.*, *Williams* v. *Quarterman*, 293 Fed.

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[4] Similarly, a federal district court for Florida recognized, in the context of assessing a defendant's competency to stand trial, that a diagnosis of malingering "does not provide any definitive indication of [a] Defendant's true intellectual capacity." *United States* v. *Thompson*, No. 6:05-cr-87-Orl-18DAB, 2007 WL 2480066, at *2 (M.D.Fla. Aug 28, 2007). As in Mr. Morris's case, the defendant presented scores in the mid-50's from tests where no malingering was suspected, and the state presented contradictory expert testimony that the defendant had malingered on their test and that he was probably not retarded. *Id.* at 5. The court held that "[i]t is possible, of course, for a mentally retarded individual to malinger," and therefore, that the defendant's "refusal to cooperate . . . does not logically support the conclusion that he is not mentally retarded." *Id.*

Appx. 298, 310–11 (5th Cir. 2008) (rejecting *Atkins* claims based in part on finding of malingering); *Phillips* v. *State*, 984 So. 2d 503, 510 (Fla. 2008) (same).

This case also presents an excellent vehicle to resolve the role of malingering in the assessment of intellectual functioning. The *Atkins* claim was fully litigated below on the merits, and the record is well developed following an evidentiary hearing. Moreover, the question presented is dispositive of the intellectual-functioning analysis: absent the conclusion that malingering can automatically defeat a claim of mental retardation, the Alabama Court of Criminal Appeals would have had to conclude that Mr. Morris suffers from the intellectual deficit necessary to sustain an *Atkins* claim. Mr. Morris's IQ scores, which arose from testing by two of Alabama's three board certified forensic psychologists, Pet. App. 147a–48a, were 53 and 50. And whereas the state's expert did not present a definitive opinion about Mr. Morris's IQ, Mr. Morris's expert accounted for the possibility of malingering in his conclusion that Mr. Morris had an IQ of 50. *Id.* at 159a.[5]

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[5] Both Dr. Shealy and Dr. Ackerson also noted that Mr. Morris's score of 73 when he was six further demonstrated that he was mentally retarded. Pet. App. 151a (Dr. Shealy: "if we know from the history that he's been mentally retarded since six years old, it makes the issue of whether he's malingering in adulthood moot"); *id.* at 169–70a (Dr. Ackerson: childhood IQ testing "revealed that his intellectual functioning was 'well below average'"). The Court in *Atkins* held that the diminished intellectual-function requirement can be satisfied by an IQ score of "between 70 and 75 or lower." *Atkins*, 536 U.S. at 309 n.5. And notwithstanding Dr. King's naked assertion that an IQ

B. In addition to conflicting with the approach of the Texas Court of Criminal Appeals, the decision of the Alabama Court of Criminal is incorrect. A defendant can be both malingering and mentally retarded.

As Dr. Shealy testified, without contradiction, "the conclusion that because somebody is malingering on a malinger[er]'s test does not lead one to the automatic conclusion that the person is not mentally retarded." Pet. App. 154a. Rather, a mentally retarded individual "is capable of taking a [malingerer's] test and scoring in the range that would indicate that he's malingering, even if he's mentally retarded." *Id.* at 150a. *See also id.* at 156a ("[Y]ou can have an IQ in the range of mild mental retardation and still be bright enough to [malinger], still have enough intellectual ability to do that."); *id.* at 157a ("[J]ust because somebody is mentally retarded doesn't mean they can't also be malingering.").

Scientific research confirms that it is possible for someone to malinger during an IQ test and still be mentally retarded. In one instance, an individual who was diagnosed with an IQ of 58 prior to age 18—and prior to any legal difficulties—scored 4 out of 50 on the Test of Memory and Malingering, "a score well below chance and suggestive of his awareness of the correct answers despite his responses to the con-

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of 73 is "certainly not retarded," Pet. App. 22a, "[t]here is no Alabama case law stating that a single, or even multiple, raw IQ score above 70 automatically defeats an *Atkins* claim when the totality of the evidence (scores) indicates that a capital offender suffers subaverage intellectual functioning." *Thomas* v. *Allen*, 607 F.3d 749, 757 (11th Cir. 2010).

trary." Tara L. Victor & Kyle Brauer Boone, *Identification of Feigned Mental Retardation, in Assessment of Feigned Cognitive Impairment* 311, 335 (Kyle Brauer Boone ed., 2007).

The conclusion of the Alabama Court of Criminal Appeals—that malingering can automatically foreclose a finding of subaverage intellectual functioning—is especially problematic because malingering assessments are often inaccurate. In one study, the Test of Memory Malingering, upon which the state's expert relied in this case, misclassified over 40 percent of the sample as malingering when in fact many were actually mentally retarded. Kolleen E. Hurley & William Paul Deal, *Assessment Instruments Measuring Malingering Used With Individuals Who have Mental Retardation: Potential Problems and Issues*, 44 J. Mental Retardation 112, 116 (2006). As a result, "considerable caution [must] be exercised when using these various instruments [including The Test of Memory Malingering] for assessment of individuals with below average intelligence or mental retardation." *Id.* at 117.

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Mr. Morris had IQ scores of 50 and 53. His expert testified, without contradiction, that even mentally retarded individuals can malinger, and took malingering into account in calculating Mr. Morris's IQ. The approach of the Alabama Court of Criminal Appeals and the Mississippi Supreme Court—allowing suspicion of malingering to override multiple IQ scores under 55—conflicts with that of the Texas Court of Criminal Appeals and contradicts the

most relevant science. Accordingly, the Court should grant the petition to resolve the proper standard for assessing allegations of malingering.

II. The Lower Courts Are Divided As To The Significance Of Post-Incarceration Evidence In Assessing A Defendant's Adaptive Functioning.

In *Atkins*, the Court recognized that the standard definition of mental retardation includes "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Atkins*, 536 U.S. at 308 n.3 (quotations omitted). In concluding that Mr. Morris did not suffer from the necessary adaptive deficits, the Alabama Court of Criminal Appeals relied extensively on post-incarceration evidence—contrary both to other federal appellate and state high courts and to the relevant science.

A. The evidence of deficits in adaptive behavior, included Mr. Morris's school records, which revealed that he was "Slow" and failed most of his classes, Clerk's Record (Second Supp. Record) at 382–86, and extensive evidence from his siblings, who identified a range of significant limitations, Nov. 26, 2007 Hearing Tr. (Supp. Record Vol. 2) at 39, 71–75, 79.

In upholding the trial court's conclusion that Mr. Morris nonetheless did not suffer from significant adaptive deficits, the Alabama Court of Criminal Appeals relied heavily on testimony related to Mr.

Morris's incarceration. In particular, the court noted that "Morris sought medical attention in jail when needed and articulately requested his medication or need for treatment." *Id.* at 28a. *See also id.* at 17a (nurse's testimony that "she had met with Morris at least six times concerning his medical conditions and treatments while he was incarcerated at the jail"); *id.* (Mr. Morris was "able to take advantage of the medical services provided in the jail, as well as fill out the written medical forms"). *See also Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002) (rejecting *Atkins* claim and noting that the defendant "earned a GED certificate while he has been in prison and has completed community college classes there").

The Alabama courts are joined in this approach by the Fourth and Fifth Circuits and the Florida Supreme Court. *See Walker* v. *Kelly*, 593 F.3d 319, 328 (4th Cir. 2010) (rejecting *Atkins* claim and noting that defendant had "obtained goods for himself while in prison" (quotations omitted)); *Maldonado* v. *Thaler*, 625 F.3d 229, 243 (5th Cir. 2010) (rejecting *Atkins* claim and noting, from the defendant's incarceration, his "interactions with others, his correspondence with others, his maintaining a commissary account, and his use of the grievance system" (quotations omitted)); *Thomas* v. *Quarterman*, 335 Fed. Appx. 386, 389 (5th Cir. 2009) (rejecting *Atkins* claim and noting that defendant "demonstrated organizational skills while incarcerated, successfully following a weight-loss plan and using a calendar to keep track of his appeals"); *Jones* v. *State*, 966 So. 2d 319, 328 (Fla. 2007) (relying on post-incarceration evidence of (1) defendant's exer-

cise regimen, (2) ability to obtain medical care, (3) maintain funds in inmate account, and (4) keep cell clean and orderly).

Other courts, including the Eleventh Circuit, the Mississippi Supreme Court, and the Texas Court of Criminal Appeals, have rejected this approach.

In *Holladay* v. *Allen*, 555 F.3d 1346 (11th Cir. 2009), the Eleventh Circuit noted that "[i]t would be inaccurate to use current observers of [the defendant] because his [prison] environment is so restricted that one could not get a proper breadth of understanding of his abilities." *Id.* at 1351. *See also id.* at 1358 n. 16 ("Both experts agreed that [his] adaptive functioning cannot be accurately assessed now because he has spent over 17 years in prison, a highly restricted and restrictive environment.). In particular, and contrary to the Alabama Court of Criminal Appeals in this case, the Eleventh Circuit held that the defendant had demonstrated the necessary adaptive deficits, even though he was able "to procure appropriate medical care while he was incarcerated." *Id.* at 1360.

Likewise, in *Doss* v. *State*, 19 So. 3d 690 (Miss. 2009), the Mississippi Supreme Court recognized the diminished value of post-incarceration evidence of adaptive functioning. *See id.* at 714 (collecting literature); *id.* ("Dr. Grant admitted that the adaptive-functioning tests he administered were not normed for a prison population."). And in *Lizcano* v. *State*, No. AP-75879, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010), the Texas Court of Criminal Appeals rejected reliance on testimony that "in the institu-

tional setting of the jail, the appellant could maintain his hygiene and keep his cell orderly" because "evidence of apparent adaptive strengths displayed in an institutional context are of limited probative value." *Id.* at *38.

It is especially important for the Court to resolve this lower-court split on the appropriate use of prison behavior in assessing a defendant's adaptive functioning. Nearly 30 percent of all courts rejecting *Atkins* claims have relied at least in part on the defendant's prison behavior. John H. Blume et al., *An Empirical Look at* Atkins v. Virginia *and its Application in Capital Cases*, 76 Tenn. L. Rev. 625, 636 (2009). The "selective focus by the courts on the adaptive strengths of *Atkins* claimants" is especially common in states, like Alabama, "with active capital dockets." Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 Cornell L. Rev. 329, 351–52 (2010).

B. As with the question of malingering, the decision of the Alabama Court of Criminal Appeals is incorrect. Scientists have recognized that "the limited opportunities available to people in prison make it impossible to assess adaptive behavior 'within the context of community environments . . .' as required by the 2002 AAMR standards." Caroline Everington & J. Gregory Olley, *Implications of* Atkins v. Virginia*: Issues in Defining and Diagnosing Mental Retardation*, 8 J. Forensic Psychol. Prac. 1, 12 (2008).[6]

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[6] *See also* Richard Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia: *How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of*

Finally, this case presents an excellent vehicle for the Court assess the manner in which courts rely on evidence of prison behavior to rebut family testimony about a defendant's capabilities during childhood. As with the malingering issue, the question of Mr. Morris's adaptive capabilities was fully litigated on the merits in the trial court and on appeal, following an evidentiary hearing.

Moreover, the reliance on prison-behavior evidence affects the ultimate outcome of Mr. Morris's case. The other evidence presented by the state and relied on by the Court of Criminal Appeals, including Mr. Morris's history of odd-jobs and his alleged attempt to deceive the police upon his arrest, would not itself establish the necessary adaptive functioning. *See Holladay*, 555 F.3d at 1349–50, 1359–60 (defendant suffered from significant adaptive deficits even though he could administer blood tests to himself, drive a car, had been married, held jobs, committed petty thefts, could remember names and dates, and has successfully escaped from prison). Similarly, the

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Mental Retardation in Death Penalty Cases, 41 U. Rich. L. Rev. 811, 848–49 (2007) (measuring the adaptive behavior of an incarcerated defendant "poses significant problems"); Linda Knauss & Joshua Kutinsky, *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following* Atkins *v.* Virginia, 11 Widener L. Rev. 121, 131 (2004) (adaptive assessments are "unusually tricky with incarcerated individuals, because the structure and supports provided by a prison environment . . . reduce . . . the environmental demands placed upon inmates"); Kay B. Stevens & J. Randall Price, *Adaptive Behavior, Mental Retardation, and the Death Penalty*, 6 J. Forensic Psychol. Prac. 1, 19 (2006).

use of prison-behavior testimony also appeared to affect the court's consideration that Mr. Morris's mental retardation did not begin before age 18—notwithstanding his IQ score of 73 at age six and his poor performance in school—as the Court of Criminal Appeals pointed to Mr. Morris's attempts to seek medical care in prison to contradict testimony from Mr. Morris's sister that he was "incapable of taking his temperature or taking medicine." Pet. App. 28a.

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Commentators have warned that "without a future holding clarifying what constitutes mental retardation," many states "will continue to violate the spirit, if not the letter, of the Eighth Amendment to the Constitution." Mark Libell, Atkins' *Wake: How the States Have Shunned Responsibility for the Mentally Retarded*, 31 Law & Psychol. Rev. 155, 155 (2007). The two issues presented by Mr. Morris's case provide an excellent opportunity for the Court to provide needed clarity and ensure that lower courts respect *Atkins* in both letter and spirit.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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